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No. _____

In the SUPREME COURT OF THE UNITED STATES

October Term, 1994

James Kevin Craig,
Petitioner,

v.

California State Bar
Respondent

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

PETITION FOR A WRIT OF CERTIORARI

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30 pp

Questions Presented

1) Does the "no religious test" phrase of Article VI, paragraph 3 of the United States Constitution, and the ruling in *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), which prohibited the states from requiring oaths of office the terms of which conform to the tenets of the religion of Christianity, also forbid the states from permitting an applicant to the Bar to swear voluntarily an oath the terms of which conform to the religion of Christianity?

2) Does this Court's ruling in *In re Summers* 325 U.S. 561, 65 S.Ct. 1307 (1945) (holding that a Christian pacifist who disagreed with that part of the constitution requiring military training could not take the "support oath" in good faith) forbid a prospective attorney at law, who declares the authority of God and of the Christian Scriptures to be superior to that of the State, from being admitted to the Bar for inability to take in good faith a required oath to "support the Constitution," contrary to the First Amendment?

3) In view of modern policy considerations of "Global Interdependence," does this Court's ruling in *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), holding that U.S. citizenship cannot be required for admission to the Bar, absolve an applicant to the Bar from taking an oath to "support the Constitution," which this Court has "substantially equated to that allegiance which, by the common law, every citizen was understood to owe to his sovereign."

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v.

California State Bar, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

James Kevin Craig respectfully petitions for a writ of certiorari to review the decision of the Supreme Court in the State of California in this case.

OPINIONS BELOW

The Supreme Court in the State of California did not file an opinion or comment in this case. (No. 5034117). (See Appendix C, "Report on Decision in [L.A.] *Daily Journal.*") Pleadings below include Brief of Petitioner, Brief of Respondent, and Replication (Reply) of Petitioner.

JURISDICTION

The Supreme Court in the State of California entered its judgment on April 27, 1994. (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATEMENT

Petitioner seeks admission to the practice of law in California. The State of California requires applicants to swear a "Support Oath."[1] Based on his understanding of judicial interpretations of this oath, Petitioner believed that he could not take the oath without violating his conscience, and would be subjected to disbarment or charges of perjury if he did.

In correspondence with the Respondent California State Bar, Petitioner inquired about the possibility of modifying the required oath to protect First Amendment rights. The State Bar replied that it lacked authority to modify a legislatively mandated oath, and added their opinion that the oath was constitutional, citing relevant Federal authority.

In order to exhaust administrative remedies before seeking extraordinary relief at the Supreme Court of the State of California, Petitioner filed a formal petition with the Committee of Bar Examiners of the State Bar seeking a modification of the oath, analyzing the U.S. Supreme Court decisions cited by Respondent, and supporting his belief that his proposed modification was Constitutional under the First Amendment.

The Committee of Bar Examiners restated their position that they were without authority to modify a legislatively mandated oath.[2]

Petitioner then sought relief in the Supreme Court of the State of California, which has original jurisdiction over matters pertaining to the State Bar.

Petitioner filed a single Petition for a Writ of Mandate which raised essentially two issues:

A. *Torcaso v. Watkins* 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961) held that the states could not require oaths the terms of which conformed to the tenets of Chris-

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1. The full oath reads: "I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability." Cal. Bus. & Prof. Code §6067 (West, 1988).

2. Appendix A, *infra*, Letter from Respondent State Bar.

tianity. Petitioner, a Christian, believes that he is required by his faith to take only oaths the terms of which conform to the tenets of Christianity.

Believing the First Amendment permitted the voluntary swearing of religious oaths as part of the "free exercise of religion," and that Article VI of the U.S. Constitution did not prohibit the voluntary taking of what might otherwise be called a "religious test," Petitioner prayed the California Supreme Court to permit the California State Bar to allow a voluntary modification of the required oath, taking as a model one of the oaths Constitutionally required by the states in the 172 years following the ratification of the U.S. Constitution and preceding *Torcaso*.[3] That petition was denied. Petitioner here seeks review of that decision.

The substantial federal Constitutional issues raised by *Torcaso v. Watkins* of the establishment and free exercise of religion (the First Amendment), and Trinitarian test oaths (Article VI), were properly and timely pleaded, being raised in all formal pleadings submitted by Petitioner.

B. *In re Summers* 325 U.S. 561; 65 S.Ct. 1307, 89 L.Ed. 1795 (1945) held that a prospective attorney could not take an oath to support the constitution in good faith if he disagreed with parts of that constitution, even if the disagreements resulted from sincerely held religious beliefs.

In a very lengthy brief which Respondent State Bar characterized as "scholarly,"[4] Petitioner suggested that this decision was problematic, alerting the California Supreme Court to the fact that the nationalistic legal foundations of the *Summers* decision were subsequently overruled.[5] Petitioner coupled this analysis with the serious First Amendment challenges to "support oaths" which have been raised in this century, and proposed that Attorneys were not obligated to take the oath prescribed in the U.S. Constitution (Art. VI, Sec. 3) because the Attorney at law does not hold

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3. For text of proposed oath, *see infra*, "Reasons for Granting the Petition," 6.

4. Brief of Respondent, 6.

5. *Girouard v. U.S.*, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084 (1946), overruling *U.S. v. Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302 (1931).

an "office" created by the Constitution and required to swear such an oath.

In response, Respondent reiterated the contention that the requirement to take a "support oath" was "a settled question," citing the six leading Federal cases. Petitioner carefully analyzed these cases in a supplemental Reply Brief and found that the claims of these Courts that the question was "settled" were mere *dicta* in cases which did not directly challenge the *Summers-Torcaso* Attorneys' "support" oath. Further, Petitioner noted that all the cases cited by Respondent State Bar trace their ultimate source of authority back to a citation of Blackstone to the effect that at common law, every "citizen" owed allegiance to his sovereign.[6] Petitioner pointed out that the nexus between the Attorney at law and the duties of support and loyalty to the sovereign required of citizens was broken by a U.S. Supreme Court ruling that one could not be required to be a citizen in order to be an attorney.[7]

Petitioner suggested a modification of the "support" clause of the oath which explicitly affirmed the legitimate state interests as enunciated in the relevant case law in place of the ambiguous promise to "support the Constitution."[8] That petition was denied.

The substantial federal Constitutional issues raised by the *Summers* case and the denial of First Amendment rights which would take place if that decision were followed, were properly and timely pleaded, being raised in all stages of the proceedings below.

Final judgment on the Petition raising all these issues was filed by the California Supreme Court on April 27, 1994, with no opinion or comment. Petitioner here seeks review of that decision.

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6. *Knight v. Board of Regents* 269 F.Supp 339 (1967), *aff'd per curiam*, 390 U.S. 36, 88 S.Ct. 816, 19 L.Ed.2d 812 (1968).

7. *In Re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

8. For text of proposed oath, see *infra*, "Reasons for Granting the Petition," 10-11.

REASONS FOR GRANTING THE PETITION

Justice Felix Frankfurter has said, "It should not be assumed that oaths will be lightly taken; *fastidiously scrupulous regard* for them should be encouraged."[9] Failure to do so has led not only to a denial of due process of law in the cases of those who do so regard oaths, but to a breakdown in respect for the integrity of law and government.

This case presents an opportunity to decide two important questions of federal law which have not been, but should be settled by this Court, both of which center around the requirement of a prospective attorney to take an oath to "support the constitution."

In pleadings below, Respondent State Bar has consistently urged that the requirement of Attorneys to "support the Constitution" is a "settled question." Petitioner herein has not forgotten the maxim, *stare decisis et non quieta movere*, which Justice Reed (then Solicitor General) rendered, "stand by the precedents and do not disturb the calm."[10] But in the sea of "loyalty oath" cases, there is no calm. "The foregoing cases and others contain thousands of pages of confusing formulas, refined reasonings, and puzzling holdings."[11] Courts on all levels have and continue to render opposite holdings in nearly identical fact patterns. In many cases oaths are "lightly taken," or else used to bruise the scruples of many. This Court can bring clarity in areas of the law which have left many confused about the honesty and predictability of the legal system. And to start, the confusion and fears surrounding loyalty oaths in the 20th century resulted in part from an unprecedented disturbing of the 19th century calm our Founding Fathers left us.

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9. Concurring in *American Communications Association CIO v. Douds* 399 US 382 at 420, 70 S.Ct. 674 at 695 (1950). Emphasis added.

10. S. Reed, Stare Decisis *and Constitutional Law*, 35 Pa.B.A.Q. 131, 131 (1938), cited by J. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U.L.Rev. 1-2 n.2 (1983).

11. *Baird v. State Bar of Arizona* 401 U.S. 1 at 4, 91 S.Ct. 702 at 705, 27 L.Ed. 639 (1971) (J. Black, announcing the judgment of the Court in an opinion joined by JJ. Douglas, Brennan, and Marshall).

A. *Torcaso v. Watkins* and "Religious Tests"

Petitioner in this case approaches oaths with scruples derived from the *Westminster Confession of Faith* (1647), which devotes an entire chapter to "Lawful Oaths and Vows." An oath is said to be "a part of religious worship" (§ I), which can only be done in the Name of God (§§ II, VI), and must be subordinated to "the Word of God" (§ VII).

Although separated from the Reformation by nearly 300 years, the Framers of the Constitution had tremendous respect for Christian scruples, and drafted oaths which conformed to Biblical requirements, such as this one, from Delaware:

> Every person who shall be chosen a member of either house, or appointed to any office or place of trust . . . shall . . . make and subscribe the following declaration, to wit: "I _____, do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, Blessed for evermore; and I do acknowledge the holy scripture of the Old and New Testaments to be given by divine inspiration."[12]

As late as 1892, this Court noted the presence of Christian or theistic oaths in all the (44) states, and -- without disturbing the calm -- gave them an impassioned endorsement.[13]

But in 1961, this Court, in *Torcaso v. Watkins*,[14] held that the Establishment Clause of the First Amendment prohibited the states from requiring a Christian oath from one who adhered to the religion of Secular Humanism. Sociologically, Biblical oaths had been fading from the scene for decades.[15] Legally, it was a disturbing of the

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12. T. Skillman, *The Constitutions of All the States According to the Latest Amendments*, 181 (1817). *See also* Del. Const. art. 22 (adopted Sept. 20, 1776), 1 Del. Code Ann. 117 (Michie, 1975).

13. *Rector, etc., of Holy Trinity Church v. United States*, 143 U.S. 457,468, 12 S.Ct. 511, 515, 36 L.Ed. 226 (1892).

14. *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961).

15. The Maryland Court had detailed the long secularization of the oath. *Torcaso v. Watkins*, 223 Md. 49, 162 A.2d 438, 441 (1960).

calm.

In his petition to the California Supreme Court, Petitioner in the present case, citing constitutional debates and other historical documents, argued that Article VI, para. 3, prohibiting a "religious test," in fact prohibited what we would call a *denominational* test, one which favored the Episcopalians over the Presbyterians (for example), but did not prohibit a generic Christian oath. Following Justice Stewart's concurring opinion in *Sherbert v. Verner*,[16] similar analysis of the use of the Establishment Clause in *Torcaso* questioned the "secular reach" of that decision.

Note well that Petitioner in this case is not calling for a return to state-mandated Christian oaths.[17] He merely argues that if theocratic Christian oaths could be constitutionally mandated for over 150 years, then a stronger case can be made for recognition of the individual right to a voluntary free exercise of theocratic oath-taking. His petition to voluntarily take such an oath as Delaware's was denied by the California Supreme Court.

It is to be feared that the ruling in *Torcaso* has subtly conveyed a message that "fastidiously scrupulous regard" for oaths need not be "encouraged," especially among Christians. The government has likely had a profound effect in determining the nature of religious exercise among those required to take oaths. Even historical and theological discussion may not be as "uninhibited, robust, and wide-open"[18] as it might have been had the Court not apparently closed the door to fastidiously scrupulous Christian oath-takers. This Court is in many ways the Nation's moral Pedagogue, and its decisions set the national agenda.

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16. decided the same day as the "School Prayer" case; *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). ("I think that the Court's approach to the Establishment Clause has on occasion, and specifically in Engel, Schempp and Murray, been not only insensitive, but positively wooden, and that the Court has accorded to the Establishment Clause a meaning which neither the words, the history, nor the intention of the authors of that specific constitutional provision even remotely suggests." J. Stewart, concurring, at 374 U.S. 414, 83 S.Ct. 1799.)

17. Petitioner also opposes prayer in public schools, for reasons that will become apparent, below.

18. *New York Times v. Sullivan* 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964).

Review of the *Torcaso* case to permit the voluntary swearing of Christian oaths would encourage many people to pursue vocations from which they might otherwise be obstructed by a secularist oath. The Reformed Presbyterian Church in North America is officially committed as a denomination to Trinitarian oaths, and the rights of their members have been denied.[19] Many others who are not members of that denomination, such as Petitioner in this case, have come to the same conclusions.[20]

Petitioner, who for years was a Chalcedon Scholar,[21] notes that secular oaths have been targeted by the "Religious Right,"[22] and could become a springboard for a wave of litigation. A decision here could forestall conflict.[23]

No rights or interests have vested around secular oaths. The rights of no other people would be restricted by permitting the free exercise of theocratic Christian oaths.

A review of the California decision and the conflict between the *Torcaso* and *Holy Trinity* cases could have a dramatic impact in shaping a coherent theory of balance between the Establishment and Free Exercise clauses of the First Amendment. Review would also encourage many on the "right" who are alarmed by decisions (particularly

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19. *Smith v. County Engineer of San Diego Co.*, 266 C.A.2d 645, 72 Cal.Rptr. 501, 285 P.2d 617 (1968).

20. D. Barton, *Keys to Good Government*, 1994.

21. Chalcedon was identified as the "think tank" of the "Christian Right," W. Estep, *Revolution Within the Revolution: The First Amendment in Historical Context 1612-1789*, 11-15 (1990); Bill Moyers, Transcript: "God and Politics: On Earth as it Is in Heaven," Public Affairs Television (broadcast date: Dec. 23, 1987), *and* 97 *Newsweek* 5:60 (Feb. 2, 1981).

22. See the manifesto by G. North, *Political Polytheism: The Myth of Pluralism*, 1989. According to Estep, *supra*, note 13, *id.*, North, who took his Ph.D. at the University of California, is a very influential writer in the "religious right."

23. In an unrelated field of law, this Court has granted certiorari "to forestall a possible conflict in the lower courts" on an "important" issue, even though there was "no direct conflict" among various district court and court of appeals opinions. *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176 (1980); R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, §4.8 179-80 (7th ed. 1993).

celebrated cases from the years 1961-63[24]) which seem to impose a "Secular Humanist" agenda upon local governments.[25] The reputation of this Court could be enhanced; surely it needs the support of this powerful group.[26]

B. *In re Summers* and "Good Faith" Support of the Constitution

If this Court grants certiorari to consider the issue of the free exercise of religious oaths, it will then be forced to review the case of *In re Summers*.[27] Christian "Test oaths" such as that of Delaware, above, declare that ultimate authority rests beyond the nation-state. The long line of cases which Respondent State Bar insists have "settled" the issue of loyalty oaths, rest on a completely different judicial paradigm, one which denies a supra-national Authority.

Even if a Christian oath were to be permitted, Petitioner here would still have no assurance that the California State Bar would admit him to the practice of law, or would not bring proceedings for disbarment or perjury at some point in the future. In an attempt to avoid the result in *Konigsberg v.*

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24. P. Irons, *The Courage of Their Convictions*, 366-67 (1988) ("Like no other legal issue, the prayer issue simply will not surrender to judicial edict. More than two decades after the Supreme Court banned school prayer, teachers lead their students in prayer in more than half of America's ten thousand school districts.")

25. D. Barton, *The Myth of Separation*; 1992. J. Whitehead, *The Second American Revolution*, 1982.

26. A. Goldberg, *Equal Justice* 75 (1971), cited by J. Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U.L.Rev. 2 n.11 (1983). ("[S]tare decisis foster[s] public confidence in the judiciary and public acceptance of individual decisions by giving the appearance of impersonal, consistent, and reasoned opinions.")

27. *In re Summers*, 325 U.S. 561; 65 S.Ct. 1307, 89 L.Ed. 1795 (1945) (holding that a Christian pacifist, disagreeing with that part of the Constitution requiring military training, could not take the "support oath" in good faith.)

State Bar of California,[28] and *In re Anastaplo*,[29] Petitioner went overboard in fully and candidly setting forth his politico-religious beliefs. In a word, Petitioner is a non-violent "anarchist." Petitioner has for the last six years lived in a House of Hospitality in the anarchist-pacifist Catholic Worker movement. He views the State as the institutionalization of violence, utterly without moral legitimacy. He has committed his life to the reconstruction of an alternative social order, culminating in the eventual elimination of "constitutional" governments. It would be difficult to say that he "supports" the Constitution, in any ordinary sense of that word.

Thus, Petitioner, whose anarchist views plainly preclude "support" for any constitution, proposed to Respondent State Bar the following "narrowly-drawn" oath in an effort to protect both First Amendment rights and legitimate state interests:

> I solemnly swear (or affirm) that I am dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government,[30] and am committed to dissuading others from resorting to force or violence,[31] that I am not loyal to any foreign State,[32] and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my

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28. *Konigsberg v. State Bar of California*, 366 U.S. 36; 81 S.Ct. 997, 6 L.Ed.2d 105 (1961).

29. *In re Anastaplo*, 366 U.S. 82, 81 S.Ct. 978, 6 L.Ed.2d 135 (1961), reh. den. 368 U.S. 869, 82 S.Ct. 21, 7 L.Ed.2d 69 (1961). (Both cases holding that obstruction of State Bar investigations would ground denial of admission to the Bar.)

30. The language is from *Law Students v. Wadmond*, 401 U.S. 154 at 166, 91 S.Ct. 720 at 728, 27 L.Ed.2d 749 (1971). Petitioner would not object to gender-inclusive language.

31. *See* the concerns in *U.S. v. Schwimmer*, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889 (1929) over a petitioner -- an "uncompromising pacifist" with "no sense of nationalism" (*Idem.*) -- and her "purpose or power to influence others" as a "lecturer and writer" (at 279 U.S. 651, 49 S.Ct. 450).

32. In his Brief, Petitioner cited 11 loyalty oath cases which indicated a concern over foreign influence or domination.

knowledge and ability.[33]

The California Supreme Court denied the Petition to permit this modification.

The facts in *Summers* are a "chilling" parallel to those in the present case. Summers, a Christian, sought admission to the Illinois Bar. A conscientious Christian pacifist, Summers could not agree with that part of the Illinois Constitution requiring military training of its citizenry. The Illinois Bar denied his application for admission. The Illinois Supreme Court upheld the decision of the State Bar, and that court's decision was upheld by this Court.[34]

The standard set in *Summers* is clearly indefensible. Summers was barred from the practice of law because of disagreement with one part of the state constitution. Present Petitioner knows of not a single attorney who, having taken an oath to "support the Constitution," agrees with every single provision of that Constitution.

Summers' unrealistic standard was the product of a festering nationalism which was born out of conflict with anarchists at the turn of the century,[35] and would reach a peak during the "vicious, irrational paroxysm of fear and rage known as McCarthyism . . . which plagues us to this day."[36]

This particularly virulent strain of nationalism was set forth in the case of *U.S. v. Macintosh*,[37] and the *Summers* case rested foursquare on that case.[38] In *Macintosh*, an alien willing to swear "support" for the Constitution was

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33. The second half of the current oath.

34. *In re Summers*, 325 U.S. 561; 65 S.Ct. 1307, 89 L.Ed. 1795 (1945).

35. Petitioner's Brief, Appendix F, "The Establishment of a Secular, Political Religion Through the 'Support Oath.'" pp. 77-79, analyzes these cases: *U.S. ex rel Turner v. Williams*, 194 U.S. 279, 24 S.Ct. 719 (1904); *Lopez v. Howe*, 170 CCA 337, 259 F. 401, 12 ALR 192 (1919); *Abrams v. U.S.*, 250 U.S. 616, 40 S.Ct. 17 (1919).

36. *Rodriguez v. Seamans*, 463 F.2d 837, 843 (D.C. Cir. 1972) (Wright, dissenting).

37. *U.S. v. Macintosh*, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302 (1931).

38. *In re Summers*, 325 U.S. 561 at 572-73, 65 S.Ct. 1307 at 1313-14.

denied the opportunity to do so because as a pacifist he was unable to state that he was "willing" to bear arms.

Macintosh highlights the clear ideological demarcations: Those who are Christians, particularly pacifists, have a loyalty to a Higher Power. Their obedience to and "support" of the laws and constitutions of men are subordinate to a supra-national allegiance. Respect for this allegiance dominated the law in the 19th century.[39] But the *Macintosh* Court repudiated this Transcendental Authority and set into motion the secularist nationalism that would culminate in *Torcaso* thirty years later. The *Macintosh* Court acknowledged the holding in *Holy Trinity*[40] with one hand and withdrew it with the other:

> When he speaks of putting his allegiance to the will of God above his allegiance to the government, it is evident in the light of his entire statement, that he means to make *his own interpretation* of the will of God the decisive test . . . . [True, w]e are a Christian people (Holy Trinity Church v. United States, 143 U.S. 457,470,471, 12 S.Ct. 511,[516], 36 L.Ed. 226), according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God. *But*, also, we are a nation with the duty to survive; a nation whose . . . government must go forward upon the assumption, and safely can proceed upon no other, that *unqualified allegiance to the nation* and submission and obedience to the laws of the land . . . are not inconsistent with *the will of God*.[41]

Most people feel a kind of instinctive repulsion against an oath of unqualified allegiance, and the concept of conscientious civil disobedience, a bedrock doctrine of Christianity,[42] is central to Petitioner's religious beliefs. But without

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39. D. Barton, *The Myth of Separation*, 1992.

40. *Holy Trinity Church v. United States*, 143 U.S. 457,470,471, 12 S.Ct. 511,[516], 36 L.Ed. 226 (1892). *Cf.* text at note 13, *supra*.

41. *Macintosh*, 283 U.S. 605, at 625, 51 S.Ct. 570, at 575. ("his own interpretation," Court's emphasis; all other emphasis added. In particular, Petitioner believes that the word "But" carries with it a profoundly significant disjunction.)

42. Cf. Acts 5:29 ("We ought to obey God rather than men.")

a workable paradigm, the logic of secularist nationalism goes unresisted. Thus, as the God of Scripture has been removed from loyalty oaths, the Nation-State has been enthroned as the new god. Applicants believing in a transcendental authority have been held incapable of "supporting" the constitution.[43] This standard of allegiance, although passionately argued and consistent with a nationalist ideology, is nevertheless an impossible one; no one takes this rhetoric seriously. It says in effect that if constitutional processes produce a law which requires an applicant to turn his neighbor in for a train ride to the concentration camp, he must be "willing to obey."

Congress attempted to buffer the *Macintosh* case by giving rights to those seeking naturalization, placing them on the same ground as natural-born citizens who have access to conscientious objector status. *Macintosh* was thus overruled in 1946,[44] a year after the *Summers* decision. But *Girouard* apparently did not overrule *Summers*,[45] which is still cited as controlling.[46] And in fact, some courts have

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43. In an Appendix to Petitioner's California Brief ("Civil Disobedience and the Support Oath"), the relevant cases were analyzed, including *Petition of Williams*, 474 F.Supp. 384 (D. Ariz. 1979) (citing *Allan v. United States*, 115 F.2d 804 (9th Cir. 1940) and *U.S. v. Rossler*, 144 F.2d 463 (2d Cir. 1944)); *In re De Bellis Petition for Naturalization*, 493 F.Supp. 534 (E.D. Pa. 1980). See also *In re Saralieff*, 59 F.2d 436 (E.D. Mo. 1932), cited in *In re Petition for Naturalization of Matz*, 296 F.Supp. 927 (E.D. Cal., 1969).

44. *Girouard v. U.S.*, 328 U.S. 61, 66 S.Ct. 826, 90 L.Ed. 1084 (1946).

45. This Court has granted certiorari in cases involving a question upon which prior decisions of the Supreme Court are irreconcilable or inconsistent. *Funk v. United States*, 290 U.S. 371 (1933); *Wolfle v. United States*, 291 U.S. 7 (1934). R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, §4.5 176 (7th ed. 1993).

46. *Cf. American Communications Ass'n CIO v. Douds*, 339 U.S. 382 at 405, 70 S.Ct. 674 at 687 (1950). *Gillette v. United States*, 401 U.S. 437, 462n23, 91 Sup Ct 828, 842n23 (1971), *Baird v State Bar of Arizona*, 401 U.S. 1 at 3, 91 S.Ct. 702 at 704, 27 L.Ed.2d 639 (1971). When not cited in reference to matters of procedure, the citations to *Summers* are nearly always cryptic. This Court has granted certiorari where the decision below is premised upon a prior Supreme Court opinion whose implications are in need of clarification. *SEC v. United Benefit Life Ins. Co.*, 387 U.S. 202, 207 (1967). R. Stern, E. Gressman, S. Shapiro, K. Geller, *Supreme Court Practice*, §4.5 176 (7th ed. 1993).

held that *Girouard* overruled *Macintosh* "on strictly statutory grounds," and thus impose the *Macintosh/Summers* standard of unqualified belief in the reigning nationalistic political orthodoxy.[47]

This Court has tried another solution: temper the authority of the nation-state by claiming that the once-solemn and sacred oath is now just an "amenity."[48]

> This contention ignores not only the effect of the oath on those who will not solemnly swear unless they can do so honestly and without prevarication and reservation, but also its effect on those who believe the written law means what it says"[49]

As a result, no one with extremist beliefs who is required to take a "support oath" can predict whether he will be allowed by a *Cole*-type court to take an increasingly-meaningless formality,[50] or whether he will be held to the standard of *Summers/Macintosh*, and be barred as incapable of taking the oath in good faith.[51] The decisions are chao-

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47. *Naturalization of Brakel*, 524 F.Supp. 300 at 301 (N.D. Ill. 1979).

48. *Cole v. Richardson*, 405 U.S. 676 at 685, 92 S.Ct. 1332, at 1337; 31 L.Ed.2d 593 (1972). Petitioner analyzed this case at some length in correspondence with the State Bar, and Petitioner's Brief at 83-86. It is a frightening response to the denial of rights occasioned by secularist nationalism. It only entrenches a disrespect for law.

49. *Cf. Baggett v. Bullitt*, 377 U.S. 360 at 374, 84 S.Ct. 1316 at 1324 (1946). Petitioner in the case now before this Court, when describing his conflict of conscience, has been advised by attorneys who have themselves taken the "support oath" to "Just make it 'mean' what ever you want it to mean and get it over with!" This attitude toward the law is common. It is also destructive of its integrity.

50. How can ordinary people know if a given judge considers a "support" oath to be a solemn act of worship or just an amenity like the one struck down in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 117, 87 L.Ed. 1628 (1943)(flag salute)?

51. *Compare In re Petition for Naturalization of Matz*, 296 F.Supp. 927 (E.D. Cal., 1969) (denying naturalization to Jehovah's Witness who, "because of religious training and belief refuses to vote, serve on juries or otherwise participate in government" (at 929), citing *In re Saralieff*, 59 F.2d 436 (E.D. Mo. 1932)(at 930n6), and *Macintosh*)(at 931n.20)), *with In re Pisciattano*, 308 F.Supp 818 (D. Conn. 1970) (granting naturalization to Jehovah's Witness who, "because of her religious beliefs and training . . . would not vote, engage in politics, or serve on a jury" (at 819), citing *Girouard* (at 820)).

tic; the obligations of "support" are unclear: One could conclude that this Court holds that one will be permitted to take a once-solemn oath to "support the Constitution" even if "he is *now*, in one way or another, *engaged in* an attempt to overthrow the Government *by force or violence*,"[52] but a *Summers*-type non-violent Christian will not be so permitted. And "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[53]

It is common knowledge that there is a profound cynicism in the average American concerning our legal system. It is widely perceived that political promises mean nothing. The law seems to be applied subjectively and unpredictably.[54]

A widespread feeling that the law is subjectively applied and objectively unpredictable is the death-knell of that system.

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52. *Whitehill v. Elkins*, 389 U.S. 54, 62, 88 S.Ct. 184, 188, 19 L.Ed.2d 288, 234 (1967) (J. Harlan, joined by JJ. Stewart and White, dissenting.)

53. *Cramp v. Board of Public Instruction of Orange County, Florida*, 368 U.S. 278 at 287, 82 S.Ct. 275 at 280 (1961), citing *Conally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322.

54. *See* note 51, *supra*. Petitioner's Brief, Appendix F, "The Establishment of a Secular, Political Religion Through the 'Support Oath,'" describes the presence of the *Macintosh* standard in modern courts and the conflict that emerges when courts try to temper its harshness by diluting the meaning of the oath: *American Communications Ass'n CIO v. Douds*, 339 U.S. 382, 70 S.Ct. 647 (1950); *Barenblatt v. U.S.*, 360 U.S. 109; 79 S.Ct. 1081 3 L.Ed.2d 1115 (1959) *reh. den.* 361 U.S. 854, 80 S.Ct. 40, 4 L.Ed.2d 93 (1959); *In re Anastaplo*, 366 U.S. 82; 81 S.Ct.978, 6 L.Ed. 2d 135 (1961), *reh. den.* 368 U.S. 869, 82 S.Ct. 21, 7 L.Ed.2d 69 (1961); *Whitehill v. Elkins*, 389 U.S. 54, 88 S.Ct. 184, 19 L.Ed.2d 228 (1967); *Law Students Civil Rights Research Council Inc. v. Wadmond*, 401 U.S.154 91 S.Ct. 720, 27 L.Ed.2d 749 (1971); *Cole v. Richardson*, 405 U.S. 676 92 S.Ct. 1332; 31 L.Ed.2d 593 (1972); *Arbesu, Naturalization of*, 347 F.Supp. 1014 (E.D. La. 1972); *In re Meghnot's Petition*, 238 F.Supp. 479 (E.D. Mich. 1965); *Socialist Workers Party v. Martin*, 345 F.Supp. 1132 (S.D. Tex. 1972).

C. Attorneys as "Officers"

A century of secularist nationalism has necessitated the questioning of the unpredictable application of Art. VI "support oaths" to attorneys. Chauvinistic nationalism is a dangerous anachronism. We now live in an era of Global Interdependence. Attorneys holding a supra-national vision of social order must not be discouraged, rather, should be *encouraged*, to boldly act on their convictions. The *Summers* decision and its progeny should be reviewed. And as the sun sets on the 20th century, it may now be appropriate to review the possibility of eliminating altogether the requirement of attorneys to swear an oath to "support the constitution."

It is clear that those who hold political offices created by or under the constitution are obligated to swear to "support the constitution."[55]

It is well established by case law that public employees must take a similar oath, although the constitutionality of this requirement is at least arguable (in a way not so of those whose offices are created by the Constitution.[56])

Attorneys, however, differ from Constitutional office-holders and public employees. The office of Attorney-at-law was not created by the Constitution, and although the Attorney is called an "officer of the Court,"[57] he is "not an 'officer' within the ordinary meaning of that term,"[58] and the Attorney's "employer is . . . not the American government."[59]

The California State Bar responded to these arguments by citing a string of cases that began with *Knight v. Board*

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55. U.S. Const. Art II. sec. 1, para. 8, and Art. VI, sec. 3.

56. In a sense, all the Founding Fathers were naturalized citizens, which raised important questions about national loyalty which are absent in our day.

57. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 at 792-93, 95 S.Ct. 2004 at 2016, 44 L.Ed.2d 572 (1975).

58. *Cammer v. U.S.*, 350 U.S. 399, 405, 76 S.Ct. 456, 459 (1956).

59. *Cf. Ozonoff v Berzak*, 744 F.2d 224, 233 (1st Cir. 1984).

of Regents[60] and saw its clearest expression in *Law Students Civil Rights Research Council, Inc. v. Wadmond.*[61] In his reply, Petitioner observed that the "support oath" was not challenged in these cases, and that all the *dicta* in these cases concerning the "well-established" validity of an oath to support the constitution trace back to Blackstone, cited by the court in *Knight*, saying "support of the constitutional governments can be substantially equated to that allegiance which, by the common law, every citizen was understood to owe his sovereign.[62]

The nexus between attorneys and citizenship, however, was dissolved by this Court in *In re Griffiths.*[63] It was there held that an attorney did not have to be a citizen, undercutting Blackstone's nationalistic legal foundation upon which courts have based the required support oath.

CONCLUSION

The way we treat oaths is symptomatic and symbolic of the way we treat the law as a whole.

Courts are in substantial disarray in the way they treat oaths of office, and this is due to a failed jurisprudential paradigm, which only this Court can fashion.

This Court is not just an impersonal arbiter of judicial disputes, but serves the nation as Conscience and Pedagogue. This Court inescapably sets the standard of our nation's values. This case is an ideal vehicle to begin[64] re-examining fundamental presuppositions because Petitioner's

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60. *Knight v. Board of Regents* 269 F.Supp 339 (1967), aff'd per curiam, 390 U.S. 36, 88 S.Ct. 816, 19 L.Ed.2d 812 (1968).

61. *Law Students Civil Rights Research Council, Inc. v. Wadmond* 401 U.S. 165, 91 S.Ct. 720, 27 L.Ed.2d 749 (1971).

62. *Knight v. Board of Regents* 269 F.Supp 339, 341 (1967). Detailed analysis of Resonent's string of cases was raised in Petitioner's Reply, Appendix G, "The Myth of the Settled Question."

63. *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973).

64. And it will be just a beginning -- a kind of post-*Torcaso* "mid-course correction."

views are part of both the "religious right" and the "left,"[65] allowing for focused reflection in comparative political calm.

Thus, while protecting the First Amendment rights of the "fastidiously scrupulous," this Court can also advance vital national interests:

> In recognition of transnational realities of the modern world, the archaic nationalism exemplified by 20th century fears of disloyalty can be replaced by a global vision that will last into the 21st century.
>
> In our increasingly lawless and nihilistic culture, recognition of this nation's Christian roots and the importance of Spiritual values will strengthen the social order of the Republic.

Therefore, the Court should grant the petition.

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65. Petitioner has published articles in *The Chalcedon Report* (note 21, *supra*), as well as *The Catholic Worker* (founded in New York City by Dorothy Day in 1933).

APPENDIX A

CORESPONDENCE FROM RESPONDENT STATE BAR TO PETITIONER

The Committee of Bar Examiners of the State of California
Office of Admissions
555 Franklin St. San Francisco, California 94102 (415) 561-8303

June 8, 1993

James Kevin Craig
311 Main Street
Santa Ana, CA 92701

Assigned Petition No. 11(b)
Registration No. 546334598

Dear Mr. Craig:

During its meeting on June 4, 1993, the Committee of Bar Examiners took up consideration of your request for modification of the attorney's oath. The Committee has directed that I advise you that since the form of the oath was established by the California legislature, the Committee is without authority to modify it and has, therefore, declined to grant your request. To be admitted to practice, you must take the oath as set forth in Section 6067 of the California Business & Professions Code.

Also, please understand that Rule IX, ***Rules Regulating Admission to Practice Law in California*** specifies that no one shall be eligible for admission to practice law in California unless the applicant has taken the attorney's oath within five years of the last day of the examination he or she passed. Our records indicate that you passed the July 1988 bar examination, and that means that if you do not take the attorney's oath by July 28, 1993 (the fifth anniversary of the last day of the July 1988 examination), you will be required to again take and pass the examination before being eligible for certification to the Supreme Court.

Please feel free to let this office know if you have any questions.

Very truly yours,

s/_____

Jerome Braun
Senior Executive, Admissions

JB491/L61093

APPENDIX B

NOTICE OF DECISION FROM CALIFORNIA SUPREME COURT

S034117
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

JAMES KEVIN CRAIG, Petitioner

v.

STATE BAR OF CALIFORNIA, Respondent

Petition for writ of review DENIED.

s/_____
Chief Justice

SUPREME COURT
FILED
APR 27 1994
Robert Wandruff Clerk
s/_____
Deputy

APPENDIX C

REPORT ON DECISION FROM
CALIFORNIA SUPREME COURT
[Los Angeles] *Daily Journal*
107:82 (April 29, 1994) p. 20

Court Refuses to Let Attorney Practice Without Taking Oath

By Philip Carrizosa
Daily Journal Staff Writer

SAN FRANCISCO - After months of study, the state Supreme Court has refused to allow a would-be lawyer to practice law in California without taking an oath to support the state and federal constitutions.

James Kevin Craig, who describes himself as a Christian and philosophical anarchist, says he cannot take the oath customarily administered to new lawyers because it requires him to swear to support the Constitutions of the United States and of California.

As a Christian, Craig says, he can swear only in the name of God and can swear allegiance only to God, not to the state or its laws. Craig says he is willing to take the second part of the oath, which pledges to "faithfully discharge the duties of an attorney and counselor at law" to the best of his knowledge and ability.

Nonetheless, Craig, who works at the Santa Ana Catholic Worker, a hospitality house for homeless drug addicts, says he believes it is his duty to practice Biblical Law to defend those who are attacked by the law of man. Craig passed the Bar exam in 1988.

Officials for the Committee of Bar Examiners have refused to admit Craig to the practice of law because he won't take the oath. The committee has also refused to change the oath, saying it lacks the power to modify the oath mandated by the state Legislature.

Furthermore, bar examiners contend, the constitutionality of the oath is well-established and not an open question, as Craig contended.

Craig filed a 93-page brief crammed with legal and religious arguments last July and the State Bar replied in August. The justices had Craig's petition under review ever since, indicating that they were giving it serious consideration.

But when the matter finally came up for the vote on Wednesday at the court's regular closed weekly conference, the justices unanimously voted to deny it without comment, *Craig v. State Bar*, S034117.

No. 94-301

Supreme Court, U.S.
FILED
SEP 28 1994
OFFICE OF THE CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1994

James Kevin Craig, *Petitioner,*

v.

State Bar of California, *Respondent.*

To Petition for a Writ of Certiorari
to the Supreme Court of
the State of California

BRIEF FOR RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

May California, without violating petitioner's First Amendment free exercise of religion rights, require that petitioner, as a condition of being admitted to practice law, swear or affirm that as an attorney he will support the federal and state constitutions; or does petitioner have a "free exercise" right to substitute for such secular oath, a theocratic Christian oath affirming his supra-national loyalty to the authority of God and the Christian Scriptures.

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STATEMENT

Petitioner James Kevin Craig is an applicant for admission to practice law in California who passed the bar examination but who was denied admission because he refused to take an oath to support the Constitution of the United States and the Constitution of the State of California, as required by California Business and Professions Code section 6067.[1] (Petition for Writ of

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[1]Cal. Bus. & Prof. Code section 6067 provides:

> Every person on his admission shall take an oath to support the Constitution of the United States and the Constitution of the State of California, and faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability. A certificate of the oath shall be indorsed upon his license. (Original version at Cal. Code Civ. Proc. §278, amended Cal. Code Am. 1880, ch. 34, §1, p. 56.)

The language of the oath in dispute here

Certiorari ["Petition"], Appendixes A, B and C.)

In petitioner's view, an oath[2] is

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is contained in an "oath card" that an applicant must execute and return to the State Bar of California. A copy of the oath card is set forth in the appendix to this brief.

Petitioner did not object to taking that part of the oath that required him "faithfully to discharge the duties of any attorney to the best of his knowledge and ability."

[2]While Cal. Bus. & Prof. Code § 6067 itself does not specifically permit an "affirmation" in lieu of an oath, an affirmation is permitted (see appendix) and unquestionably is sufficient in California. See Cal. Const., art. XX, § 3, which specifies the oath of office for all state public officers and employees, executive, legislative and judicial, and permits an oath or affirmation. See also, accord, Cal. Govt. Code § 1360.

Affirmation of support in lieu of an oath is historically a neutral and permissible legislative accommodation of religious belief. See Board of Educ. of Kiryas Joel v. Grumet, ___ U.S. ___, 114 S.Ct. 2481, 2501 (1994) (Kennedy, J., concurring) and id. at 114 S.Ct. 2512. (Scalia, J., dissenting.)

part of religious worship, which can only be done in the "Name of God" and must be subordinated to the "Word of God." Petition, pp. 3, 6. Indeed, petitioner seems to assert that he has a First Amendment free exercise of religion right to substitute for the "Secular Humanist" support oath a theocratic Christian "test oath" of the type struck down by the Court in Torcaso v. Watkins, 367 U.S. 488 (1961). (See Petition, pp. 2-3, 6-9.) Consistent with this view, petitioner requested the California Supreme Court to issue its writ directing the Committee of Bar Examiners of the State Bar of California, as the court's administrative arm, to allow petitioner to be certified for admission on the taking of the following oath in lieu of the oath of constitutional support

required by section 6067:

> "I, A.B., do profess faith in God the Father, and in Jesus Christ His only Son, and in the Holy Ghost, one God, blessed for evermore; and I do acknowledge the Holy Scriptures of the Old and New Testaments to be given by divine inspiration.
>
> I solemnly swear (or affirm) that I am dedicated to the peaceful and reasoned settlement of disputes between men, and between a man and his government, and am committed to dissuading others from resorting to force or violence, that I am not loyal to any foreign State, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability."[3]

The California Supreme Court declined to order such a substitution

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[3]The language of the first paragraph of this proposed oath appears to have been taken from the early Delaware Oath quoted at p. 6 of the petition. See Rector, etc., of Holy Trinity Church v. United States, 143 U.S. 457, 469 (1892).

and this petition followed. (Petition, p. 1, and Appendixes B and C.)

REASONS FOR DENYING WRIT

It is not correct, as petitioner seems to imply, that this case involves a "loyalty oath" as distinguished from a forward-looking, promissory oath of constitutional support. (See Petition, p. 5.) Petitioner has not been questioned about his beliefs or associations in order to test his "loyalty" or the "good faith" with which he could take the support oath. Cf. Baird v. State Bar of Arizona, 401 U.S. 1, 4-8 (1971); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 161-167 (1971).

The premise of petitioner's argument for granting the writ – that the law in the area of "loyalty oaths" is confusing and unsettled (Petition,

p. 5) – is simply irrelevant, regardless of its truth. Nothing more or less is involved here than a simple, forward-looking oath of constitutional support of a type repeatedly upheld in the past. See, e.g., Cole v. Richardson, 405 U.S. 676, 680-686 (1972); Connell v. Higginbotham, 403 U.S. 207, 208 (1971); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 161-162; Knight v. Board of Regents, 269 F. Supp. 339, 340-342 (S.D.N.Y. 1967), aff'd per curiam, 390 U.S. 36 (1967). Neither is this the first time that the Court has considered and rejected a First Amendment "free exercise" of religion challenge to a support oath. See Biklen v. Board of Education, 333 F. Supp. 902, 905-908 (N.D.N.Y. 1971) (upholding constitutionality of New York law requiring teachers to take support

oath in face of First Amendment attack by teacher who contended that it violated her religious and conscientious beliefs as a Quaker), aff'd per curiam, 406 U.S. 951 (1972). Also unavailing is petitioner's argument that the support oath is unconstitutionally vague within the meaning of the due process clause. (Petition, p. 15.) See Ohlson v. Phillips, 304 F. Supp. 1152, 1154-1155 (D. Colo. 1969) (holding support oath not unconstitutionally vague or overbroad), aff'd per curiam, 397 U.S. 317 (1970); Hosack v. Smiley, 276 F. Supp. 876, 878 (D. Colo. 1967), aff'd per curiam, 390 U.S. 744 (same) (1967).

Petitioner also argues that there is no reason to require attorneys to take support oaths of the type required by the California Constitution, because attorneys are not legislative, executive

or judicial "officers." (Petition, pp. 16-17.) Nevertheless, as petitioner also recognizes, attorneys are often referred to as "officers of the court." See Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975). Indeed, as Mr. Justice Marshall recognized in his dissent in Wadmond, 401 U.S. at 192: "The oath of constitutional support requires an individual assuming public responsibilities to affirm . . . that he will endeavor to perform his public duties lawfully." And as the Court noted in Goldfarb v. Virginia State Bar, 421 U.S. at 792: "The interest of states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice . . ." (See also Hoover v. Ronvin, 466 U.S. 558, 569, n. 18 (1984). That petitioner

as a self-described "anarchist" feels conscientiously unable to affirm support for the organic law of the nation and state does not make it any less constitutionally appropriate for the California Legislature to determine as a policy matter that an oath or affirmation of such support is a predicate for admission to practice law.

Finally, petitioner apparently suggests that the time has come to return to the past, to the period preceding Torcaso v. Watkins, when, for many years following the ratification of the U.S. Constitution, the states were permitted to require or allow oaths of public office that conformed to the tenets of Christianity. (Petition, pp. 2-3, 6.) As petitioner sees it, Torcaso v. Watkins ushered in an era of Secular Humanism, one in which the

"Nation-State" was enthroned as the "new god." (Petition, pp. 6-9, 12-13.) According to petitioner, such "secular nationalism" has become a dangerous anachronism in this modern era of "Global Interdependence," the "trans-national realities" of which suggest that 20th century fears of disloyalty can be replaced by a "global vision" for the 21st century. (Petition, pp. 16-18.)

It seems not unlikely that many would contest petitioner's view that the nations and peoples of the world have progressed to the point that "supra-national visions of social order" have eliminated the need for commitment to the preservation of the organic laws of our nation and state. Indeed, many might argue that even with the end of the cold war, there is still a degree of

racial, ethnic and religious conflict that makes the world a very unstable and dangerous place. See, e.g., Potential U.S. Enemies Amass High-Tech Arms, L.A. Times, Sept. 1, 1994, at A1. Moreover, even domestically, some might feel that calls for a return to "Christian theocracy" signal even greater need to preserve and protect all our basic constitutional freedoms, secular or not. In all events, it is submitted that the forward-looking, promissory oath of constitutional support required by section 6067 has not become a "meaningless formality"[4] as petitioner

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[4]In making this argument, petitioner focuses on the Court's reference in Cole v. Richardson, 405 U.S. at 685, to the Massachusetts's support oath there considered as "no more than an amenity." However, that appellation was used in response to an attack on the oath as void for vagueness, simply to indicate that the oath created neither specific

suggests; and that petitioner does not have a First Amendment "free exercise" right to substitute a "theocratic Christian oath" in its place.

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responsibilities nor triggered specific sanctions, other than prosecution for perjury involving a knowing and willful falsehood--in taking the oath. As the Court noted, far from being meaningless, the oath requires that persons in positions of public trust commit themselves to live by the constitutional processes of our system. (Id.) Since petitioner is unwilling or unable to make such a commitment, under California law he cannot be licensed as an attorney.

CONCLUSION

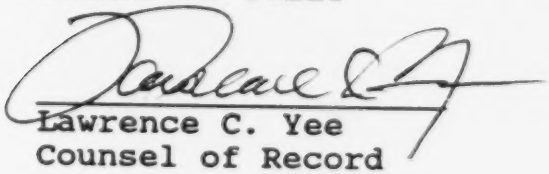
It is respectfully submitted that the oath of constitutional support required by California as a condition of admission to practice law is constitutional both on its face and as applied to petitioner, despite his religious beliefs to the contrary. That oath requires no more of petitioner than does the oath required by the Court of those seeking admission to its Bar. Sup. Ct. R. 5.4. The petition should be denied.

DATED: September 28, 1994

Respectfully submitted,

DIANE C. YU
LAWRENCE C. YEE
STARR BABCOCK

ROBERT M. SWEET



Lawrence C. Yee
Counsel of Record

APPENDIX

STATE BAR OF CALIFORNIA OATH CARD

I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California, and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability.

Dated: This _____ day of _____ 19_____

_____

COPY

I hereby certify that the foregoing oath, taken by the attorney above named, as required by law, was formally administered by and subscribed to before me

this _____ day of _____ 19_____

[seal]

_____

Supreme Court, U.S.
FILED
OCT 7 1994
OFFICE OF THE CLERK

(3)

No. 94-301

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

James Kevin Craig,
Petitioner,

v.

California State Bar
Respondent

On Petition for a Writ of Certiorari to the
Supreme Court of the State of California

SUPPLEMENTAL BRIEF OF PETITIONER AND REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1) Does the "no religious test" phrase of Article VI, paragraph 3 of the United States Constitution, and the ruling in *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), which prohibited the states from requiring oaths of office the terms of which conform to the tenets of the religion of Christianity, also forbid the states from permitting an applicant to the Bar to swear voluntarily an oath the terms of which conform to the religion of Christianity?

2) Does this Court's ruling in *In re Summers* 325 U.S. 561; 65 S.Ct. 1307 (1945) (holding that a Christian pacifist who disagreed with that part of the constitution requiring military training could not take the "support oath" in good faith) forbid a prospective attorney at law, who declares the authority of God and of the Christian Scriptures to be superior to that of the State, from being admitted to the Bar for inability to take in good faith a required oath to "support the Constitution", contrary to the First Amendment?

3) In view of modern policy considerations of "Global Interdependence," does this Court's ruling in *In re Griffiths*, 413 U.S. 717, 93 S.Ct. 2851, 37 L.Ed.2d 910 (1973), holding that U.S. citizenship cannot be required for admission to the Bar, absolve an applicant to the Bar from taking an oath to "support the Constitution," which this Court has "substantially equated to that allegiance which, by the common law, every citizen was understood to owe to his sovereign."

SUPPLEMENTAL BRIEF OF PETITIONER AND REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Petitioner wishes to bring clarity to the Court on three issues which were misrepresented in Respondent's Brief Opposing Certiorari.

Petitioner would also beg the Court to consider recent legislation which was passed after Petitioner filed in the California Supreme Court, and was unknown to him when he filed his Petition for Certiorari.

A. The Oath and the National Religion

In his pleadings before the California Supreme Court, Petitioner clearly distinguished his views from Quakers and Anabaptists who choose to "affirm" rather than "swear."[1] Petitioner finds the distinction to be meaningless, and in any case actually prefers to take an "oath" rather than an "affirmation."

Respondent's discussion of this issue[2] obscures the heart of this litigation.

Nor is this case about "loyalty oaths" as opposed to a "forward-looking, promissory oath,"[3] and Respondent's discussion is not helpful to the Court.[4]

This case is about a National Religion.

Petitioner begins with the recognition that the act of swearing an Oath is a liturgy, a ritual, a part of religious worship. This has been the unquestioned understanding of the Oath since the earliest origins of the Common Law and Anglo-American jurisprudence. We must then ask, of *which religion* is the Oath a liturgical expression?

Petitioner's survey of the case law demonstrates clearly that at the time the Constitution and the Bill of Rights were

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1. *Petition for Writ of Mandate in the California Supreme Court*, Appendix A, "Petitioner's Religious Views," pp. 31ff.

2. Respondent's Brief in Opposition, at 2.

3. Respondent's Brief in Opposition, 5.

4. *Id.* at 5-7.

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tified, the Oath was seen as a Christian ritual, and the ms of oaths conformed to that religion.

But the holdings in cases such as *Holy Trinity*[5] have not n adhered to in the 20th century. Under strong pressure m adherents of the religion of Secular Humanism, the th (and law in general[6]) is now a liturgical expression of t non-Christian religion.[7] The *Torcaso* case explicitly tered the religion of the Oath from Christianity to Secular-

Legal scholars instantly recognize the central issue in s case: "Civil Religion," which employs the liturgical ns, psychological motivations, and social purposes of gion to buttress the power of the State.

Literally doze icles have appeared in the legal in jus years on this subject, and are the Oath as the epitome of

ly an arguable "Establish- understandably, there is cise among those who are d and are forced to "priva- ars, advocates of the religion everly disguised the imposition religion as "neutrality." But to petitioners like

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5. *Holy Trinity Church v. United States*, 143 U.S. 457, 12 S.Ct. 36 L.Ed. 226 (1892).

6. S. Levinson and R. Bellah, *A.A.L.S. Law and Religion Panel: as Our Civil Religion (Symposium: The Secularization of the Law)*, Mercer L. Rev. 477 (1980).

7. Or, more accurately, a "syncretism" or combination of the reli- ns of Christianity and Secular Humanism.

8. *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 82 (1961).

9. S. Levinson, *Pledging Faith in the Civil Religion: or, Would Sign the Constitution?*, 29 Wm & Mary L. Rev. 113 (1987). S. vinson, *Constitutional Faith* (1988).

10. G. Bradley, *Dogmatomachy -- A "Privatization" Theory of the ligious Clause Cases*, 30 St. Louis U.L.J. 275; S. Levinson, *The nfrontation of Religious Faith and Civil Religion: Catholics Becoming stices*, 39 De Paul. L. Rev. 1047 (1990).

Summers[11] and Macintosh,[12] such "neutrality" is indistinguishable from "hostility."

This forms the background for the concerns of traditional, non-secular religionists, which reached a peak after the decision of this Court in *Employment Div., Dept. of Human Resources of Ore. v. Smith,*[13] and culminated in the passage of the "Religious Freedom Restoration Act."[14] Petitioner brings that Act to the attention of this Court as being entirely consistent with the arguments raised before the California Supreme Court and dispositive of this case.[15]

Petitioner is confident that not one of the cases cited by Respondent in opposition to Certiorari[16] dealt with the issue raised by Petitioner in this case (the Oath as a ritual of Civil Religion), much less resolved the First Amendment issues it raises.

B. Hidden Right-Wing Agenda?

Respondent suggests that Petitioner seeks to impose a "Christian Theocracy," which would deny rights to adherents of the secular Civil Religion.

The Petition for Certiorari notes that Petitioner was at one time a part of a movement committed to precisely these goals, but Petitioner has since been formally and informally

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11. *In re Summers,* 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945) (holding that a Christian pacifist, disagreeing with that part of the Constitution requiring military training, could not take the "support oath" in "good faith.")

12. *U.S. v. Macintosh,* 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302 (1931) ("unqualified allegiance to the nation" is "not inconsistent with the will of God.")

13. 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed2d 876 (1990).

14. Pub. L. 103-141, 107 Stat. 1488 (Nov. 16, 1993).

15. The Act was passed after Petitioner filed for extraordinary relief in the California Supreme Court (July 27, 1993), and Petitioner was unaware of its passage when Petition for Certiorari was filed in this Court. The leading cases holding against Petitioner (*Summers, Torcaso*) were handed down before the "compelling interest test" was articulated in 1963.

16. Respondent's Brief in Opposition, at 5-7. To be sure, the cases raised by Respondent are significant, and were thoroughly analyzed in pleadings before the California Supreme Court.

excommunicated from these groups because of his reluctance to politicize Biblical morality and for his opposition to state mandated test-oaths.[17] Petitioner suggests that this case is the ideal vehicle to pre-empt plans of the political theocrats to "return to the past" and impose a new Civil Religion.[18] Respondent's insinuations in this matter[19] are of no help to this Court.

C. "Anarchists" as "Officers of the Court"?

Respondent would also distract this Court by a pejorative use of the appellation "Anarchist."[20] Petitioner is undeniably a non-believer in the Civil Religion. His "anarchism" is the logical result of the pacifism on trial in *Summers*.[21] Can the state protect its legitimate interests if Petitioner, as a self-described "anarchist," becomes an "officer of the court"?

Petitioner eats, drinks, and sleeps Law. He has a passion for justice and order. He is in solidarity with the Founding Fathers' quest for Christian Virtue to characterize this land,[22] and is grieved and appalled, as they would be, at the violence and secular lawlessness of our nation today. Respondent understands that the Petitioner agrees to the second half of California's oath,[23] which he can do wholeheartedly, being committed to the "primary governmental

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17. Petition for Certiorari, 7, text at note 17.

18. Petition for Certiorari, 8, text at notes 21-23.

19. Brief for Respondent in Opposition, 9-12.

20. Brief for Respondent in Opposition, 9.

21. *Supra*, note 11. *See also* Petition for Writ of Mandate in the California Supreme Court, 9-13.

22. F. McDonald, "A Republic, Madam, If You Can Keep It," 4 *Notre Dame Journal of Law, Ethics & Public Policy* 7 (1989). D. Barton, *The Myth of Separation* (1992).

23. Brief for Respondent in Opposition, 2 n.1, requiring Petitioner "faithfully to discharge the duties of any attorney to the best of his knowledge and ability."

function of administering justice,"[24] and understanding the need "to secure the just, speedy, and inexpensive determination of every action."[25] As a Christian, Petitioner submits to "the powers that be,"[26] even as he "wrestles" with their "Civil Religion."[27]

CONCLUSION

Therefore, the Court should review the establishment of a "Civil Religion" in the decision of the California Supreme Court through a Writ of Certiorari.

Dated: October 7, 1994

Respectfully submitted,

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24. Brief for Respondent in Opposition, 8, citing *Goldfarb v. Virginia State Bar*, 421 U.S. at 792.

25. Federal Rules of Civil Procedure, Rule 1, 28 U.S.C.A.

26. *Romans* 13:1.

27. *Ephesians* 6:12.